

Supreme Court, U.S.  
FILED

JUN 18 1979

MICHAEL RODAK, JR., CLERK

## JOINT APPENDIX

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1978

No. 78-738

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KAISER AETNA; BERNICE P. BISHOP ESTATE; RICHARD LYMAN,  
JR., HUNG WO CHING, FRANK E. MIDKIFF, MATSUO  
TAKABUKI, MYRON B. THOMPSON, TRUSTEES OF THE BER-  
NICE P. BISHOP ESTATE; HAWAII-KAI DEVELOPMENT CO.,

*Petitioners,*

—v.—

UNITED STATES OF AMERICA,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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PETITION FOR CERTIORARI FILED NOVEMBER 2, 1978  
CERTIORARI GRANTED FEBRUARY 20, 1979

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## District Court Docket Entries

DATE	PROCEEDINGS
<b>1973</b>	
July 6	Complaint and Summons filed
July 26	First Amended Complaint filed
Sep. 17	Answer to Complaint filed
Oct. 5	Answer to Complaint filed
Nov. 6	Appearance and Withdrawal of Counsel filed— Bocken withdraw as counsel—Morry appearance for Defts Trustees (KING)
<b>1974</b>	
Aug. 12	Pretrial Order filed—pretrial set for 12-2-74 @ 9:00 a.m., Trial set for 12-17-74 @ 9:00 a.m., Ctrm. II. (PENCE)
<b>1975</b>	
Jan. 27	Entering Order—P/T set for 12-2-75 @ 9:00 a.m. (PENCE)
Feb. 11	Entering Proceedings—Non-Jury Trial—case contd to 3-10-75 @ 3:30 p.m. for report of coun- sel (PENCE)
Apr. 25	Entering Proceedings—Report of Counsel—Re- port by govt re ponds—Govt instructed to send notice to those who have fish ponds as indicated by Corps of Engrs & apprise them of the exist- ence of this case & if they wish to intervene to do so by 4:00 p.m., July 3, 1975; also to publish in Advertiser, Star-Bulletin and newspapers on Maui, Kauai & Hawaii—Hrg on intervention set for July 7, 1975 @ 9:00 a.m. (PENCE)

*District Court Docket Entries*

DATE	PROCEEDINGS
1975	
Apr. 29	Entering Proceedings—conf—discussion re form of order & notice—verbal order of 4-25-75 SET ASIDE—Notice to be sent to fish pond owners inviting them to participate as amicus curiae & to file briefs, notice of appearance, etc by 4:00 7-3-75 & to appear in person at hrg on 7-7-75 @ 9:00 a.m., also to publish notice in newspapers (PENCE)
Apr. 30	Order filed; Notice of Pendency of Action filed (PENCE)
May 16	Stipulation for Substitution of Party Defendant filed—deft THOMPSON substituting for RICHARDS (PENCE)
Aug. 4	Order Granting Leave to Appear as Amicus Curiae filed (PENCE)
Oct. 29	Stipulation of Documentary Evidence filed
Oct. 30	First Stipulation of Facts filed; Second Stipulation of Facts filed; Agreed Statement of Facts filed
Nov. 17	Entering proceedings at PT—discussion re relevancy of exhibits (PENCE)
Nov. 19	Entering Proceedings—Trial—Pltf's Witnesses: John C. Belshe, Dr. Wm. Kikuchi and James P. McCormack CST—Pltf's Exhibits P-1 thru P-39, P-41 thru P-54, P-58 thru P-60 and P-56 admitted—Defts' Exhibits D-1 thru D-38 admitted—Further Trial contd to 11-20-75 at 9:00 a.m. (PENCE)

*District Court Docket Entries*

DATE	PROCEEDINGS
1975	
Nov. 20	Entering Proceedings—Further Trial—Dr. Wm. Kikuchi and John Belshe recalled—Pltf rest—Defts' Witnesses: Stanley Fujimoto and Han Jurgen Krock—Exhibit D-39 admitted—defts' rest—closing arguments—case submitted (PENCE)
Dec. 11	Entering Order—Court's exhibits 1 & 2 admitted (PENCE)
1976	
Feb. 6	Decision filed—govt's declaration that Hawaii-Kai Marina is subj to §10 of the Rivers & Harbors Act is Granted—govt's req for an injunction preventing defts from denying public access to Haw-Kai Marina, & requiring them to notify the public of its accessibility is Denied—Pltf & defts to submit proposed forms of the order—cc: USA, Bocken, Morry, Bunn, Kay (PENCE)
Feb. 26	Order and Judgment filed—notified: Bocken, Morry, USA, Kay, Bunn (PENCE)
Apr. 6	Notice of Appeal filed
Apr. 19	Notice of Cross-Appeal filed—cc 9th CCA, US
Apr. 20	Stipulation of Parties That Part of the Record be Retained in the District Court filed

### Court of Appeals Docket Entries

DATE	PROCEEDINGS
1976	
May 3	DOCKETED CAUSE & ENTERED APPEARANCES OF COUNSEL
1978	
Feb. 14	ARGUED & SUBMITTED BEFORE: MERRILL, CUMMINGS & SNEED, CJJ
Aug. 18	As of Aug. 11, ORDERED OPINION (MERRILL) FILED & JUDG TO BE FILED & ENTD

### First Amended Complaint

[R. 8]

IN THE  
UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

Civil No. 73-3864

---

UNITED STATES OF AMERICA,

*Plaintiff,*

vs.

KAISER-AETNA; BERNICE P. BISHOP ESTATE; RICHARD LYMAN, JR., ATHERTON RICHARDS, HUNG WO CHING, FRANK E. MIDKIFF, MATSUO TAKABUKI, trustees of The Bernice P. Bishop Estate; HAWAII KAI DEVELOPMENT Co.,

*Defendants.*

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The UNITED STATES OF AMERICA, by its undersigned attorneys, by authority of the Attorney General, and at the request of the United States Army Corps of Engineers, alleges that:

### I

This is a civil action for a Declaratory Judgment as authorized by Section 2201 of Title 28, United States Code, to declare the waters of Kuapa Pond a navigable water of the United States, and is brought because there is an actual controversy now existing between the parties to the above-entitled action as to which plaintiff seeks the judgment of this Court. This is also an action for injunc-



*First Amended Complaint*

tive relief that would prohibit defendants from interfering with the public's right of access to the surface waters of Kuapa Pond, a navigable water of the United States.

## II

This Court has jurisdiction over the subject matter of this action pursuant to Section 1345 of Title 28, United States Code, Section 2201 or Title 28, United States [R. 9] Code, Section 403 of Title 33, United States Code, and Article I, Section 8 of the United States Constitution (Commerce Clause).

## III

The defendant Kaiser-Aetna is a partnership organized and existing under the laws of the State of California which is doing business in the District of Hawaii with its principal place of business in Honolulu, Hawaii. Kaiser-Aetna has developed a marina and associated facilities, known as Hawaii Kai, in and around the waters of Kuapa Pond.

## IV

Defendant Bernice P. Bishop Estate, which is organized under the laws of the State of Hawaii, retains the fee interest in the lands beneath Kuapa Pond, and the individual defendants

- (1) Richard Lyman, Jr.,
- (2) Atherton Richards,
- (3) Hung Wo Ching,
- (4) Frank E. Midkiff, and
- (5) Matsuo Takabuki

*First Amended Complaint*

are the present trustees of the Bernice P. Bishop Estate who, by virtue of their offices, hold the title to the fee interest of all lands under Kuapa Pond.

## V

Defendant Hawaii Kai Development Co. is, upon information and belief, a Nevada corporation doing business in the District of Hawaii and leases all lands under Kuapa Pond.

## VI

Kuapa Pond, which is located at Maunalua Bay, District of Koolaupoko, City and County of Honolulu, Island [R. 10] of Oahu, State of Hawaii, is a navigable water of the United States.

## VII

In connection with the development of Hawaii Kai, the defendant Kaiser-Aetna has carried out extensive dredging and filling operations in the navigable waters of Kuapa Pond and has created obstructions in Kuapa Pond by constructing structures in the waters of the Pond. Despite warnings from the United States Army Corps of Engineers to cease its construction activities in Kuapa Pond until it had obtained the necessary authorization pursuant to 33 U.S.C. Section 403, the defendant Kaiser-Aetna continued its dredging and filling of the Pond.

## VIII

Without first securing the necessary authorization pursuant to 33 U.S.C. Section 403, the defendant Kaiser-Aetna

*First Amended Complaint*

altered the condition and capacity of Kuapa Pond by dredging a channel connecting Kuapa Pond with the Pacific Ocean.

## IX

The defendant Kaiser-Aetna at present does possess the authorization required by 33 U.S.C. Section 403 for work and operations in Kuapa Pond; however, defendant Kaiser-Aetna in its applications for permits issued by the U. S. Army Corps of Engineers pursuant to 33 U.S.C. Section 403 continues to challenge the Corps' authority to require permits for work and operations in Kuapa Pond.

## X

In a letter dated December 6, 1972 to the District Engineer of the United States Army Corps of Engineers, the defendant Kaiser-Aetna asserted that the waters of Kuapa Pond are private and are solely for the use of Hawaii Kai [R. 11] Marina lot lessees and residents of Hawaii Kai who are licensed by Hawaii Kai to use the waters of Kuapa Pond. On at least one occasion, a patrol boat intercepted a private boat whose operator was attempting to enter Kuapa Pond from the coastal waters of Hawaii and advised him that the waters of Kuapa Pond were private and could be used only by residents of the marina or those licensed by Hawaii Kai.

## XI

Upon information and belief, defendant Bernice P. Bishop Estate and its individual trustees named as defendants herein contest the U. S. Army Corps of Engineers'

*First Amended Complaint*

determination that Kuapa Pond is a navigable water of the United States.

## XII

Upon information and belief, defendant Hawaii Kai Development Co. contests the United States Army Corps of Engineers' determination that Kuapa Pond is a navigable water of the United States.

## XIII

Upon information and belief, defendant Bernice P. Bishop Estate, its individuals trustees named as defendants herein, and defendant Hawaii Kai Development Co. contend that the waters in Kuapa Pond are private in nature for use only by residents of the Hawaii Kai Marina or those licensed in Hawaii Kai.

## XIV

The defendants' actions, as described in Paragraphs VII-XIII, inclusive, amount to an actual and continuing controversy between the defendants and the United States of America.

## XV

The United States of America and its citizens will [R. 12] suffer irreparable harm for which there is not adequate remedy at law unless the defendants are enjoined from denying the public free entry to the waters of the Pond.

WHEREFORE, the United States prays:

(1) That this Court adjudge, decree and declare the rights and legal relations of the parties to the subject mat-

*First Amended Complaint*

ter here in controversy, in order that such declaration shall have the force and effect of a final judgment and decree;

(2) That this Court adjudge, declare and decree the surface waters of Kuapa Pond, also known as Hawaii Kai Marina, including all channels, a navigable water of the United States to the plane of the mean higher, high waters of the Pacific Ocean and that authorization for construction in Kuapa Pond be secured by defendants from the United States Army Corps of Engineers in accordance with 33 U.S.C. Section 403;

(3) That the defendants be permanently enjoined from interfering in any way with the public's right of access to the waters of Kuapa Pond;

(4) That the defendants be required to give notice to the public, by means deemed adequate by the Court, that the surface waters of Kuapa Pond and all channels, are not private waters from which the public is barred; and

(5) That the Court award such other and further relief as it deems just and proper.

Dated: July 26, 1973, at Honolulu, Hawaii.

HAROLD M. FONG  
United States Attorney  
District of Hawaii

By /s/ WILLIAM C. MCCORRISTON  
William C. McCorriston  
Assistant U.S. Attorney

**Answer to Complaint, Dated September 17, 1973**

[R. 22]

IN THE  
UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

Civil No. 73-3864

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UNITED STATES OF AMERICA,

*Plaintiff,*

vs.

KAISER AETNA; BERNICE P. BISHOP ESTATE; RICHARD LYMAN, JR., ATHERTON RICHARDS, HUNG WO CHING, FRANK E. MIDKIFF, MATSUO TAKABUKI, trustees of The Bernice P. Bishop Estate; HAWAII-KAI DEVELOPMENT Co.,

*Defendants.*

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Comes now KAISER AETNA and KAISER HAWAII-KAI DEVELOPMENT Co., by its attorneys, Damon, Shigekane, Key & Char, and in Answer to the Complaint state and allege as follows:

FIRST DEFENSE:

1. Defendants admit the allegations contained in paragraphs I, and II, IX, X, XI, XII, XIII, and XIV of plaintiff's Complaint.

2. Defendants admit the allegations contained in paragraph III but by way of clarification add that defendant, Kaiser Hawaii-Kai Development Co., is the lessee under



*Answer to Complaint, Dated September 17, 1973*

that certain indenture, dated October 17, 1967, whereby the defendants, Trustees of the Estate of [R. 23] Bernice Pauahi Bishop, leased Kuapa Pond to Hawaii-Kai Community Services Co., which lease was subsequently assigned by said Hawaii-Kai Community Services Co. to the defendant, Kaiser Hawaii-Kai Development Co. effective January 1, 1971.

3. Defendants admit the allegations contained in paragraph IV and on information and belief, allege that defendant, Estate of Bernice Pauahi Bishop, through its individual trustees, defendants, Richard Lyman, Jr., Ather-ton Richards, Hung Wo Ching, Frank E. Midkiff, and Matsuo Takabuki, retain the fee interest to all that body of water and lands thereunder known as Kuapa Pond, and not merely the lands under Kuapa Pond as plaintiff alleges, which Kuapa Pond is more particularly described in the aforesaid lease filed in the Bureau of Conveyances, State of Hawaii, Liber 5839, Page 69.

4. As to paragraph V of plaintiff's Complaint, defendants admit that defendant, Kaiser Hawaii-Kai Development Co., is a Nevada corporation registered to do business in the State of Hawaii, but by way of clarification, asserts that said defendant, Kaiser Hawaii-Kai Development Co., leases all of Kuapa Pond, which includes the waters of Kuapa Pond as well as the lands under it.

5. Defendants deny the allegations contained in paragraphs VI, VIII, and XV of the Complaint.

*Answer to Complaint, Dated September 17, 1973*

6. Defendant, Kaiser Aetna, admits that it has in the past carried out some dredging and filling operations in the waters of Kuapa Pond as alleged in paragraph VII without authorization pursuant to 33 U.S.C. Section 403, [R. 24] but denies that it created obstructions in Kuapa Pond, denies that such authorizations are or were necessary, and states that prior to the time it asserted jurisdiction, the Corps of Engineers did not require permits as it considered the waters to be private.

## SECOND DEFENSE:

1. Certain lessees of marina lots, by virtue of leases from the Trustees of the Estate of Bernice P. Bishop, and certain licensees of the defendants have certain non-exclusive easements in common with the Trustees, and all others having rights through said Trustees, for rights of navigation and for other purposes in said Kuapa Pond, and that said lessees and licensees pay reasonable assessments to defendant, Kaiser Hawaii-Kai Development Co., to help defray the costs of the care, maintenance and operation of said Kuapa Pond, including without limitation, all taxes and premiums for hazard and liability insurance incurred in respect to said waters. Accordingly, said lessees and licensees have a property interest in and to Kuapa Pond which makes them indispensable parties to this action which, if the plaintiff prevailed, would adversely affect their property interests.

## THIRD DEFENSE:

The action of the plaintiff, United States of America, in declaring the waters of Kuapa Pond to be public navi-

*Answer to Complaint, Dated September 17, 1973*

gable waters of the United States, is a taking of defendants' property for public use without compensation in violation of the Fifth Amendment to the United [R. 25] States Constitution.

## FOURTH DEFENSE:

1. The United States Army Corps of Engineers has advised the defendants that it has no funds to maintain the waters of Kuapa Pond as it is now being maintained and patrolled by defendants, Kaiser Aetna, Kaiser Hawaii-Kai Development Co. and marina lot lessees and licensees. That unless the Pond is properly maintained through continuing maintenance efforts and enforcement of proper restrictions on the use of the waters, the environmental quality of said waters will be adversely affected and irreparable harm to the surrounding environment will result, particularly as a result of unrestricted public access and use.

2. Prior to its administrative determination that the waters of Kuapa Pond constitute navigable waters of the United States, the United States of America, plaintiff herein, through the United States Army Corps of Engineers, the agency prompting this Declaratory Judgment action, has failed to file an environmental impact statement assessing in detail the potential environmental impact of such determination; said impact statement being required by 42 U.S.C. §4332 (c); National Environmental Policy Act, Section 102 (2)(C) as said administrative determination constituted a major Federal action significantly affecting the quality of the environment.

*Answer to Complaint, Dated September 17, 1973*

3. Because of the failure to file an impact statement as aforesaid, the administrative determination that said waters are navigable waters of the United States of America is void and of no effect.

[R. 26] WHEREFORE, the defendants, Kaiser Aetna and Kaiser Hawaii-Kai Development Co. pray that:

(1.) Before any administrative decision can be made by any agency of the United States of America, including but not limited to the United States Army Corps of Engineers, that the waters of Kuapa Pond are public navigable waters of the United States, this Court require an environmental impact statement to be prepared as required by the National Environmental Policy Act of 1970.

(2.) This Court adjudge, declare and decree the surface waters of Kuapa Pond, also known as Hawaii Kai Marina, including all channels therein, to be non-navigable waters of the United States of America.

(3.) The Court award such other and further relief as it deems just and proper.

Dated: Honolulu, Hawaii, this 17th day of September, 1973.

/s/ R. CHARLES BOCKEN

R. Charles Bocken

*Attorney for Defendants,*

*Kaiser Aetna and Kaiser*

*Hawaii-Kai Development Co.*

*Of Counsel:*

DAMON, SHIGEKANE, KEY & CHAR

**Answer to Complaint, Dated October 5, 1973**

[R. 32]

IN THE  
UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

Civil No. 73-3864

UNITED STATES OF AMERICA,

*Plaintiff,*

vs.

KAISER AETNA; BERNICE P. BISHOP ESTATE; RICHARD LYMAN,  
JR., ATHERTON RICHARDS, HUNG WO CHING, FRANK E.  
MIDKIFF, MATSUO TAKABUKI, trustees of The Bernice P.  
Bishop Estate; HAWAII-KAI DEVELOPMENT Co.,

*Defendants.*

COMES NOW RICHARD LYMAN, JR., ATHERTON RICHARDS,  
HUNG WO CHING, FRANK E. MIDKIFF, MATSUO TAKABUKI,  
trustees of The Bernice P. Bishop Estate, by their attor-  
neys, Damon, Shigekane, Key & Char, and in Answer to  
the First Amended Complaint state and allege as follows:

FIRST DEFENSE:

1. Defendants admit the allegations contained in para-  
graphs I, II, XI, XII, XIII, and XIV of plaintiff's First  
Amended Complaint.

2. Defendants are without knowledge or information  
sufficient to form a belief as to the truth of the allegations

*Answer to Complaint, Dated October 5, 1973*

contained in paragraphs III, VII, IX and X, except that  
they admit that defendant, Kaiser Aetna, has participated  
in the development of the marina and associated facilities  
known as Hawaii-Kai in and around the waters of Kuapa  
Pond.

3. Defendants admit the allegations contained in para-  
graph IV and, further, allege that the Estate of Bernice  
Pauahi Bishop, through its individual trustees, defendants,  
Richard Lyman, Jr., Atherton Richards, Hung Wo Ching,  
Frank E. Midkiff, and Matsuo Takabuki, retain the fee  
interest to all that body of water and lands under Kuapa  
Pond as plaintiff alleges, which Kuapa Pond is more par-  
ticularly described in the aforesaid lease filed in the Bu-  
reau of Conveyances, State of Hawaii, Liber 5839, Page 69.

4. As to paragraph V of plaintiff's Complaint, defen-  
dants admit that defendant, Kaiser Hawaii-Kai Develop-  
ment Co., is a Nevada corporation registered to do busi-  
ness in the State of Hawaii, but by way of clarification,  
asserts that said defendant, Kaiser Hawaii-Kai Develop-  
ment Co., leases all of Kuapa Pond, which includes the  
waters of Kuapa Pond as well as the lands under it.

5. Defendants deny the allegations contained in para-  
graphs VI, VIII, and XV of the First Amended Complaint.

SECOND DEFENSE:

1. Certain lessees of marina lots, by virtue of leases  
from the Trustees of the Estate of Bernice P. Bishop,  
and certain licensees of the defendants have certain non-  
exclusive easements in common with the Trustees, and all



*Answer to Complaint, Dated October 5, 1973*

others having rights through said Trustees, for rights of navigation and for other purposes in said Kuapa Pond, and that said lessees and licensees pay reasonable assessments to defendant, Kaiser Hawaii-Kai Development Co., [R. 34] to help defray the costs of the care, maintenance and operation of said Kuapa Pond, including without limitation, all taxes and premiums for hazard and liability insurance incurred in respect to said waters. Accordingly, said lessees and licensees have a property interest in and to Kuapa Pond which makes them indispensable parties to this action which, if the plaintiff prevailed, would adversely affect their property interests.

**THIRD DEFENSE:**

1. The action of the plaintiff, United States of America, in declaring the waters of Kuapa Pond to be public navigable waters of the United States, is a taking of defendants' property for public use without compensation in violation of the Fifth Amendment to the United States Constitution.

**FOURTH DEFENSE:**

1. The United States Army Corps of Engineers has advised the defendants that it has no funds to maintain the waters of Kuapa Pond as it is now being maintained and patrolled by defendants, Kaiser Aetna, Kaiser Hawaii-Kai Development Co. and marina lot lessees and licensees. That unless the Pond is properly maintained through continuing maintenance efforts and enforcement of proper restrictions on the use of the waters, the environmental quality of said waters will be adversely affected and ir-

*Answer to Complaint, Dated October 5, 1973*

reparable harm to the surrounding environment will result, particularly as a result of unrestricted public access and use.

[R. 35] 2. Prior to its administrative determination that the waters of Kuapa Pond constitute navigable waters of the United States, the United States of America, plaintiff herein, through the United States Army Corps of Engineers, the agency prompting this Declaratory Judgment action, has failed to file an environmental impact statement assessing in detail the potential environmental impact of such determination; said impact statement being required by 42 U.S.C. §4332(c); National Environmental Policy Act, Section 102(2)(C) as said administrative determination constituted a major Federal action significantly affecting the quality of the environment.

3. Because of the failure to file an impact statement as aforesaid, the administrative determination that said waters are navigable waters of the United States of America is void and of no effect.

WHEREFORE, the defendants, Richard Lyman, Jr., Ather-ton Richards, Hung Wo Ching, Frank E. Midkiff, Matsuo Takabuki, trustees of The Bernice P. Bishop Estate, pray that:

(1) Before any administrative decision can be made by any agency of the United States of America, including but not limited to the United States Army Corps of Engineers, that the waters of Kuapa Pond are public navigable waters of the United States, this Court require an environmental impact statement to be prepared as required by the National Environmental Policy Act of 1970.



*Answer to Complaint, Dated October 5, 1973*

(2) All marina lot lessees and other licensees [R. 36] of the defendants as referred to in the Second Defense be made parties to this action.

(3) This Court adjudge, declare and decree the surface waters of Kuapa Pond, also known as Hawaii Kai Marina, including all channels therein to be non-navigable waters of the United States of America.

(4) The Court award such other and further relief as it deems just and proper.

Dated: Honolulu, Hawaii, this 5th day of October, 1973.

/s/ R. CHARLES BOCKEN

R. Charles Bocken

*Attorney for Defendants,*

*Richard Lyman, Jr., Atherton  
Richards, Hung Wo Ching,  
Frank E. Midkiff, Matsuo  
Takabuki, trustees of The  
Bernice P. Bishop Estate.*

*Of Counsel:*

DAMON, SHIGEKANE, KEY & CHAR

**First Stipulation of Facts**

[R. 255]

IN THE  
UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

Civil No. 73-3864

---

UNITED STATES OF AMERICA,

*Plaintiff,*

vs.

KAISER AETNA, et al.,

*Defendants.*

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The UNITED STATES OF AMERICA, by and through its attorneys, and the defendants, through their attorneys, as evidenced by the signatures hereunder, hereby stipulate, agree, and consent to the admission of the following facts into evidence.

1. The average depth of waters in the Hawaii Kai Marina (Kuapa Pond) was originally dredged to approximately six (6) feet, and the average depth of waters in the main channel connecting Maunalua Bay with the Marina is approximately eight (8) feet.

2. KAISER AETNA is responsible for overseeing the operations of the Marina. Since 1961, KAISER AETNA has maintained a policy of excluding commercial vessels from the Marina, however, KAISER AETNA has never decided whether or not commercial vessels can be operated by businesses in

*First Stipulation of Facts*

the Koko Marina Shopping Center. At the present time, none are being operated although KAISER AETNA owns a [R. 256] vessel called the "Marina Queen", which can be used to transport up to twenty-five (25) persons on cruises in the Marina.

From late 1967 to the end of 1972, the "Marina Queen" was operated by Kaiser Aetna primarily to show developers the Hawaii Kai development. Also, on Sundays, the public was invited to join the cruises. The vessel ran three (3) or four (4) times a day, with an average load of ten (10) persons.

During the calendar year 1973, Kaiser Aetna turned over the operation of the "Marina Queen" to the Koko Marina Merchant's Association. The boat ran six (6) or seven (7) times a day, for the purpose of attracting people to the adjacent shopping facilities (Koko Marine Shopping Center). As a part of the promotion of the shopping center, KAISER AETNA chartered buses to pick up tourists at various points in Waikiki and transport them to the Marina. There the tourists were given a special package of shop discounts and a ride on the "Marina Queen". Tourists were charged \$1.00 and later \$2.00 per person for this service. During this period, 18,254 tourists and a total of 38,821 persons rode the "Marina Queen". The boat ride was available at no expense to anyone who came to the Marina.

During the first week of 1974 the promotion ended, and the "Marina Queen" has remained unused since that time except that the "Marina Queen" is now available for sales promotions and school children upon request. At all times, [R. 257] the "Marina Queen" operated solely within the waters of Kuapa Pond.

*First Stipulation of Facts*

3. During 1974, a commercial scuba diving school boat picked up students at the Hawaii Kai Marina pier, but this operation was terminated by KAISER AETNA immediately after it learned of the activity.

4. The Hawaii Kai Marina has three (3) double slips sixty (60) feet in length.

5. During 1970, KAISER AETNA had plans to utilize part of the Marina for a boat rental concession. Those plans were discarded after the City informed KAISER AETNA that commercial boat operations are not allowed in private marinas under the Comprehensive Zoning Code.

6. The General Plan for Oahu, Detailed Land Use Map (March 1, 1966) shows resort development for an area adjacent to the Marina. KAISER AETNA has plans for resort development at Queen's Beach, Oahu, which is approximately two (2) miles from the Hawaii Kai Marina.

7. Andre & Parker, A DICTIONARY OF THE HAWAIIAN LANGUAGE, defines "kuapa" as: "wall of a fish pond."

The UNITED STATES OF AMERICA and the defendants further agree that the affidavits of Warran Poehler, William Kinzley, Vernon Kalino, and Maurice Taylor may be admitted into evidence in lieu of live testimony and the statements contained in the affidavits are in accordance with what the testimony of the affiants would be if they were called as witnesses at trial; provided, however, that defendants [R. 258] shall have the right to object to the testimony in the affidavits and the matters contained in this Stipulation for lack of relevance or materiality.

*First Stipulation of Facts*

This "First Stipulation of Facts" together with the Second Stipulation of Facts supersedes those certain Stipulations of Facts filed on February 11, 1975.

So STIPULATED this 29 day of October, 1975, at Honolulu, Hawaii.

Respectfully submitted,

HAROLD M. FONG  
United States Attorney  
District of Hawaii

By /s/ STEPHEN D. QUINN  
Stephen D. Quinn  
Assistant U. S. Attorney  
*Attorneys for Plaintiff*  
*United States of America*

/s/ R. CHARLES BOCKEN  
R. Charles Bocken  
*Attorney for Defendants*  
*Kaiser-Aetna and Hawaii-Kai*  
*Development Co.*

/s/ G. RICHARD MORRY  
G. Richard Morry  
*Attorney for Defendant*  
*Trustees of the Bernice P.*  
*Bishop Estate*

**Second Stipulation of Facts**

[R. 260]

IN THE  
UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

Civil No. 73-3864

---

UNITED STATES OF AMERICA,

*Plaintiff,*

vs.

KAISER-AETNA, *et al.*,

*Defendants.*

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IT IS HEREBY STIPULATED by and between the Plaintiff and the Defendants, through their respective attorneys, as follows:

1. On October 17, 1967, Kuapa Pond was specifically leased to the Kaiser Aetna interests by the Bishop Estate. The lease was subject to a Declaration of Protective Provisions which provided that every marina lot lessee had a non-exclusive easement with the Trustees and others so entitled "for purposes of navigation and access to the sea upon, over and across Kuapa Pond and all canals and other waterways thereof . . .". Under the provisions of the Declaration, assessments were to be imposed on every marina lot to be used for the care, maintenance and operation of the marina (Kuapa Pond). As of December 31, 1974, there were 1,496 marina lot owners obligated to pay \$72.00 annually for such maintenance. In addition, there were 175 non-marina lot owners who pay \$72.00 per year



*Second Stipulation of Facts*

for boat privileges on [R. 261] Kuapa Pond. Since development of the marina, 668 boats have been registered and authorized to use the pond.

2. The Marina Fund is administered by Kaiser-Aetna, however, according to the Declaration of Protective Provisions, the Hawaii Kai Marina Home Owners Association will become the assignee of the lease to the marina waters (Kuapa Pond) and will administer the marina fund on April 27, 1991, or upon the expiration or termination of said Development Agreement, whichever date is earlier.

The 1972 financial statement of the Marina Fund, audited by the firm of Haskins and Sells, Certified Public Accountants, reflects a deficit of \$92,706.00 for that year and a total deficit since inception of \$338,260.00. These deficits have been subsidized annually by Kaiser-Aetna. Dredging costs incurred by Kaiser-Aetna over a ten year period ending December 31, 1973, total \$2,245,548.00.

The Marina Fund is used to enforce the marina rules and regulations which have been established to protect the marina walls, avoid accidents, prevent dumping, collect debris created after heavy storms, and for certain other maintenance operations.

3. Neither the United States Army Corps of Engineers nor the Environmental Protection Agency has any funds appropriated nor programmed for the periodic dredging and continued maintenance of the Hawaii-Kai Marina. The United States Coast Guard has insufficient resources to patrol the Hawaii-Kai Marina except on an infrequent spot-check basis.

*Second Stipulation of Facts*

The zoning surrounding the Hawaii-Kai Marina [R. 262] will not permit the construction of hotels or resort facilities. Furthermore, Kaiser-Aetna has no present plans for seeking zoning which would permit hotel construction in the marina area.

4. The UNITED STATES OF AMERICA and the defendants further agree that the Affidavits of BARRY OKUDA, LAMBRETH HANCOCK and HANS-JURGEN KROCK may be admitted into evidence in lieu of live testimony and the statements contained in the Affidavits are in accordance with what the testimony of the affiants would be if they were called as witnesses at trial; provided, however, that the UNITED STATES OF AMERICA shall have the right to object to the testimony in the Affidavits and the matters contained in this Stipulation for lack of relevance or materiality.

This Second Stipulation of Facts, together with the First Stipulation of Facts, supersedes those certain Stipulations of Fact filed on February 11, 1975.

So STIPULATED this 29 day of October, 1975, at Honolulu, Hawaii.

/s/ STEPHEN D. QUINN  
Stephen D. Quinn  
Assistant U. S. Attorney  
For HAROLD M. FONG  
United States Attorney  
*Attorneys for Plaintiff*



*Second Stipulation of Facts*

/s/ R. CHARLES BOCKEN  
 R. Charles Bocken  
*Attorney for Defendants*  
*Kaiser-Aetna and Hawaii-Kai*  
*Development Co.*

/s/ G. RICHARD MORRY  
 G. Richard Morry  
*Attorney for Defendants*  
*Trustees of the Bernice P.*  
*Bishop Estate*

[R. 264]

**Agreed Statement of Facts**

IN THE  
 UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

Civil No. 73-3864

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UNITED STATES OF AMERICA,

*Plaintiff,*

vs.

KAISER-AETNA, *et al.*,

*Defendants.*

---

In its original state, Kuapa Fish Pond consisted of about 523 acres and extended approximately two miles inland from Maunalua Bay and the Pacific Ocean on the Island of Oahu, Hawaii. Kuapa Pond is contiguous to Maunalua Bay, and Maunalua Bay is a navigable water of the United States.

Kuapa Pond was historically a fish pond. The pond is fed by runoff waters from the surrounding mountains and hills. The fish pond together with surrounding land has at all relevant times been considered private property by the Hawaiian government and by the Trustees of the Estate of Bernice Pauahi Bishop (Bishop Estate) through a chain of title dated back to the Hawaiian monarchy.\* The Bishop

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\* Kuapa Pond is a part of Royal Patent 4475, Land Court Award 7713, Apana 30 to Victoria Kamamalu, situate in the City and County of Honolulu. While the Pond was not described separately, it was included within the boundaries of the Royal Patent of the Land of Maunalua (Certificate of Boundaries signed by the Oahu Commissioner of Boundaries, June 13, 1884).

*Agreed Statement of Facts*

Estate and its lessees have paid and continue to pay real [R. 265] property tax assessments on the pond. Bishop Estate leased the pond to various individuals for the purpose of raising mullet. Some of these leases date back to 1903. The pond was always considered as private property by the owners, and the public has been consistently excluded from using the pond without proper authorization from the owners or their lessees.

In recorded history there were two openings from the pond to Maunalua Bay which is located on the other side of the sand bar. Fish gates were present at these openings and were constructed in such a way that they could be raised or lowered at the option of the lessee.

During periods of high tides, water from Maunalua Bay would enter the pond through the openings with a noticeable current. Correspondingly, during periods of low tides, the current flow would reverse toward the ocean. The water in the fish pond was brackish from the interchange of the salt water from the ocean and the fresh rain water from the mountains.

The Hawaiians utilized the tidal action in the pond to catch fish. In times of high tides the fish gates would be opened to allow mullet and other fish to enter with the current from the ocean. During low tides, wiremeshed fish gates would be lowered to allow water but not the fish to escape the pond. Thus allowing a "flushing" of the pond. Water depths in the pond varied between zero to two feet at high tide. Large areas in the mauka end were completely dry at low tide. When used as a fish [R. 266] pond prior to development, a few flat-bottomed shallow draft boats were operated by the fishermen in their work in Kuapa Pond.

*Agreed Statement of Facts*

During the early 1900s, Kalaniana'ole Highway was constructed upon the sand bar which separated Kuapa Pond from Maunalua Bay, and the Pacific Ocean. Coral Fill was placed on top of the sand bar to provide a foundation for the highway. In its earlier days, the highway would be flooded during some heavy storms. In more recent times, however, improvements to the highway's foundation have protected the highway from flooding.

On April 27, 1961, the Trustees under the Will of the Estate of Bernice Pauahi Bishop entered into a development agreement which provided the Kaiser-Aetna interests with the master development rights to a 6,000 acre area known today as Hawaii Kai. An integral part of that agreement included the right to lease the area known as Kuapa Pond and provide improvements, such as dredging, walls, and bridges. Development of a residential community and construction of waterways were commenced at that time, and a channel was dredged to improve the Koko Head opening connecting the pond with Maunalua Bay and the ocean.

Since the development of the marina, 668 boats have been registered and authorized to use the pond. As of 1975, the population of the Hawaii Kai area is estimated [R. 267] at approximately 22,000.

DATED: Honolulu, Hawaii, this 29 day of October, 1975.

/s/ STEPHEN D. QUINN  
 Stephen D. Quinn  
 Assistant U. S. Attorney  
 For HAROLD M. FONG  
 United States Attorney  
 Attorneys for Plaintiff

*Agreed Statement of Facts*

/s/ R. CHARLES BOCKEN  
 R. Charles Bocken  
*Attorney for Defendants*  
*Kaiser-Aetna and Hawaii-Kai*  
*Development Co.*

/s/ G. RICHARD MORRY  
 G. Richard Morry  
*Attorney for Defendant*  
*Trustees of the Bernice P.*  
*Bishop Estate*

[R. 417]

**Order and Judgment**

IN THE  
 UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

Civil No. 73-3864

---

UNITED STATES OF AMERICA,

*Plaintiff,*

vs.

KAISER AETNA; BERNICE P. BISHOP ESTATE; RICHARD LYMAN,  
 JR., HUNG WO CHING, FRANK E. MIDKIFF, MATSUO  
 TAKABUKI, MYRON B. THOMPSON, trustees of the Bernice  
 P. Bishop Estate; HAWAII-KAI DEVELOPMENT CO.,

*Defendants.*

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This action came on for trial on November 19 and 20, 1975, before the United States District Court for the District of Hawaii, Honorable MARTIN PENCE, United States District Judge, presiding, and the issues having been duly tried and a written Decision having been issued by the Court on February 6, 1976, and the Court having concluded that the prayer of the Plaintiff UNITED STATES OF AMERICA for a Declaration that Hawaii-Kai Marina is subject to Section 10 of the Rivers and Harbors Act should be GRANTED, but that the request of plaintiff UNITED STATES OF AMERICA for an injunction preventing Defendants from denying public access to Hawaii-Kai Marina and requiring them to notify the public of its accessibility should be DENIED,

*Order and Judgment*

[R. 418] IT IS HEREBY ORDERED AND ADJUDGED that the United States Army Corps of Engineers has jurisdiction to regulate the Hawaii-Kai Marina under Section 10 of the Rivers and Harbors Act, subject however to the right on the part of the Defendants to control and regulate public access to the Hawaii-Kai Marina.

DATED: Honolulu, Hawaii, this 26th day of February, 1976.

MARTIN PENCE  
United States District Judge

## APPROVED AS TO FORM:

/s/ STEPHEN D. QUINN  
Stephen D. Quinn  
Assistant U.S. Attorney  
*Attorney for Plaintiff*  
*United States of America*

/s/ R. CHARLES BOCKEN  
R. Charles Bocken  
*Attorney for Defendant*  
*Kaiser-Aetna and Hawaii-Kai*  
*Development Co.*

/s/ G. RICHARD MORRY  
G. Richard Morry  
*Attorney for Defendants-Trustees*  
*of the Bernice P. Bishop Estate*

**Plaintiff's Exhibit 1**

DAEN-GCZ-C (12 Oct 72)

SUBJECT: Navigability of Kuapa Pond, Island of Oahu

To: DAEN-CWO-N FROM: DAEN-GCZ-A

DATE: 24 October 1972 CMT 2

Mr. Hedeman/37070/jf

1. By letters dated 7 March 1972 and 12 September 1972, (Inclosures 1 and 2) the Pacific Ocean Division has recommended that Kuapa Pond, Island of Oahu, Hawaii be declared a navigable water of the United States.
2. Kuapa Pond, which is a tidal body of water, extends inland for approximately two miles and is fed by run-off waters from the surrounding mountains and hills. The pond is surrounded by an extensive residential development known as Hawaii-Kai, which has been under development for over ten years by Kaiser Aetna. Numerous small pleasure craft, sail or motor powered, use the waters of Kuapa Pond for pleasure cruising, water skiing, and access to the Pacific Ocean.
3. Following a review of the materials submitted in the Division reports as well as the applicable case law, it has been determined that Kuapa Pond is a navigable water of the United States.

[signature illegible]

SELTZER

2 Incl  
as



*Plaintiff's Exhibit 1*

PODOC 12 September 1972  
 SUBJECT: Kuapa Pond, Island of Oahu

HQDA (DAEN-GCJ)  
 WASH DC 20314

COUNSEL-file  
 CF PODCO-O

## 1. References:

a. Letter PODOC-D, 7 March 1972, subject: Navigable Waters of the United States, Kuapa Pond, Island of Oahu.

b. Phone Conversation—Ericsson/Cunningham, same subject as reference a, 30 August 1972.

2. On 11 January 1972 the District Engineer advised Kaiser Aetna that the requirements for permits for work in or discharges into Kuapa Pond would be strictly enforced (Incl 1). Ensuing events were reported in reference a, which requested your advice as to whether the waters of Kuapa Pond should be considered navigable waters of the United States.

3. As a result of recent disclosures through the news media, the District is now aware that Kaiser Aetna intends to construct additional docking facilities for rental. (Note: Kaiser Aetna presently, without permit, operates docking facilities in the waters for which it charges rental fees, and restricts the use of the waters of Kuapa Pond to residents who are "licensed" to use the waters for boating. A Kaiser Aetna boat patrols the area to advise any boat owner not so licensed that the use of the waters are not authorized.)

4. Accordingly, unless advised to the contrary on or before 20 September, the District Engineer intends to vigor-

*Plaintiff's Exhibit 1*

ously enforce the provisions of Section 10 of the Rivers and Harbors Act of 1899 (33 USC 403) in all reaches of the waters of Kuapa Pond, including referral for prosecution by the U. S. Attorney as may be appropriate. This action is considered necessary to prevent irreparable damage to the littoral waters surrounding Oahu. Inclosed for your better appreciation of the area are four aerial photos made on 22 December 1971.

FOR THE DISTRICT ENGINEER:

H. LLOYD ERICSSON  
 Division Counsel

2 Incl

1. Ltr PODCO-O, 11 Jan 72
2. Photos (4 prints)

*Plaintiff's Exhibit 1*

PODCO-O

11 January 1972

Kaiser Aetna  
7120 Kalaniana'ole Highway  
Honolulu, Hawaii 96825

OP BR-File

Gentlemen:

We have been reminded at a recent Corps of Engineers meeting with the local citizens group in your community that extensive construction activity (dredging, filling, retaining walls, navigation aids, and related work) has been accomplished in waters commonly known as Kuapa Pond and under development by your company.

By virtue of this body of water being connected through improved channels to navigable waters, this pond is considered to be an integral element of the navigable waters of the United States. As such, permits under 33 U.S.C. 403 and within the meaning of the River and Harbor Act of 1899 are required for work in Kuapa Pond.

This is to advise you that the requirements for permits for work in or discharges into the waters of Kuapa Pond will be strictly enforced. Any work in or discharges into Kuapa Pond in violation of the River and Harbor Act of 1899, as construed in the light of more recent environmental legislation, is subject to penalties under law.

Sincerely yours,

WILLIAM D. FALCK  
Colonel, Corps of Engineers  
District Engineer

*Plaintiff's Exhibit 1*

Ruddle/kh  
M&R  
COUNSEL-File

PODOC-D

7 March 1972

SUBJECT: Navigable Waters of the U.S.—Kuapa Pond,  
Island of Oahu

NQDA (DAEN-GCJ)  
WASH DC 20314

1. The inclosed memorandum was prepared to facilitate our reply to the inclosed letter from the attorney for Kaiser Aetna, developers of the community known as Hawaii-Kai. Hawaii-Kai has been under development as a residential community for over 10 years. The majority of the property surrounding the body of water known as Kuapa Pond has been constructed or is in the development stage. Kuapa Pond, as it is now developed, reaches inland for approximately two miles and is fed by runoff water from the surrounding mountains and hills. Kuapa Pond is a tidal body of water.

2. The inclosed sketch shows the general layout of Kuapa Pond and the development around it. The pond is designated Hawaii-Kai marina on the sketch. The only commercial property along Kuapa Pond is the shopping center in the lower right portion of the pond. Residences around the pond range from single family dwellings to two-story condominium apartments. Berths for pleasure craft have been constructed adjacent to the shopping center and many residential units have private docks. Kaiser Aetna has performed considerable dredging and filling in developing the area as it now exists. Many small pleasure craft, sail or

*Plaintiff's Exhibit 1*

motor powered, use the waters for pleasure cruising or water skiing or as access to the ocean.

3. Only one permit has been issued by the Pacific Ocean Division for construction within the pond and this was for a fueling dock. The applicant (Kaiser Aetna) took exception to our references to these waters as navigable waters of the U.S. They did not acknowledge the permit and later built the fueling facility on land instead of on the water.

4. Request you advise if the waters of Kuapa Pond should be considered navigable waters of the United States.

FOR THE DIVISION ENGINEER:

DOUGLAS B. RUDDLE  
Assistant Division Counsel

3 Incl

1. Cy memo
2. Cy ltr fr  
Atty Shigekane  
25 Jan 72
3. Sketch of Kuapa Pond

[Law memorandum omitted in printing]

**Plaintiff's Exhibit 1**

(Letterhead of Damon, Shigekane, Key & Char, 333 Queen Street, Honolulu, Hawaii 96813)

January 25, 1972

Department of the Army  
Honolulu District, Corps of Engineers  
Building 96, Fort Armstrong  
Honolulu, Hawaii 96813

ATTENTION: William D. Falck  
Colonel, Corps of Engineers  
District Engineer

RE: *Kuapa Pond*

Gentlemen:

Your letter of January 11, 1972, wherein the U. S. Corps of Engineers asserts jurisdiction over Kuapa Pond, a private enclave, situate in Maunaloa, Honolulu, Hawaii, was referred to our firm for study and reply.

While we can appreciate your concern, we cannot agree with the Corps of Engineers' claim of jurisdiction over Kuapa Pond. As you may know, Kuapa Pond was never considered "navigable waters of the United States" as that term is defined in various federal cases and opinions. Under laws peculiar to the Kingdom of Hawaii which were recognized by the United States and its Supreme Court at the time Hawaii became a U. S. territory, Kuapa Pond has been and is private property like other real property. No navigation of any kind, including pleasure boating, was

*Plaintiff's Exhibit 1*

possible until only recently when certain dredging activities were undertaken by Kaiser Aetna's predecessor. These activities did not transform Kuapa Pond into navigable waters subject to federal jurisdiction. We enclose a copy of the opinion in *Fairchild v. Kraemer*, 204 N.Y.S. 2d 823 (1960) for your information.

However, the position of Kaiser Aetna does not mean that it is unwilling to cooperate with the Corps of Engineers in the protection of our environment. It, too, is concerned about and interested in the preservation of Hawaii's natural beauty. Accordingly, Kaiser Aetna shall be happy to discuss with you matters which are of mutual concern.

Yours very truly,

/s/ HENRY H. SHIGEKANE  
Henry H. Shigekane  
*Attorney for Kaiser Aetna*

HHS:ejk  
Enclosure  
cc: Kaiser Aetna

[Opinion in *Fairchild v. Kraemer*, 204 N.Y.S. 2d 823 (1960),  
and map of Kaupa Pond omitted in printing]

**Plaintiff's Exhibit 16**

(Letterhead of Hawaii-Kai)

May 4, 1971

Department of the Army  
Honolulu District, Corps of Engineers  
Building 96, Fort Armstrong  
Honolulu, Hawaii 96813

Gentlemen:

*Subject: Public Notice No. PODCO 968-S*

We noted in subject notice that "Kaiser Aetna . . . has applied to the Department of the Army for work in the navigable waters of the United States, Island of Oahu, Hawaii."

We wish to reemphasize a point made in our March 24, 1971 letter to you—that we are voluntarily applying for a permit regarding our dock fueling facility, that Kuapa Pond is an inland, private body of water, and that we do *not* consider said waters "navigable waters of the United States" as defined by law.

To avoid any misunderstanding, the public at large has never been and will not be permitted to enter the Pond. The fee interest is owned by Bishop Estate and the leasehold interest by us. Only authorized licensees of Kaiser Aetna are authorized to use the Pond for boating.

Very truly yours,

Kenneth D. H. Chong  
Vice President and  
Assistant Secretary

KDHC:ja



### Plaintiff's Exhibit 17

(Letterhead of Department of the Army, Honolulu District,  
Corps of Engineers, Building 96, Fort Armstrong,  
Honolulu, Hawaii 96813)

PODCO-O

11 January 1972

Kaiser Aetna  
7120 Kalaniana'ole Highway  
Honolulu, Hawaii 96825

Gentlemen:

We have been reminded at a recent Corps of Engineers meeting with the local citizens group in your community that extensive construction activity (dredging, filling, retaining walls, navigation aids, and related work) has been accomplished in waters commonly known as Kuapa Pond and under development by your company.

By virtue of this body of water being connected through improved channels to navigable waters, this pond is considered to be an integral element of the navigable waters of the United States. As such, permits under 33 U.S.C. 403 and within the meaning of the River and Harbor Act of 1899 are required for work in Kuapa Pond.

This is to advise you that the requirements for permits for work in or discharges into the waters of Kuapa Pond will be strictly enforced. Any work in or discharges into Kuapa Pond in violation of the River and Harbor Act of 1899, as construed in the light of more recent environmental legislation, is subject to penalties under law.

Sincerely yours,

/s/ WILLIAM D. FALCK  
William D. Falck  
Colonel, Corps of Engineers  
District Engineer

### Plaintiff's Exhibit 52

#### MARINA QUEEN ATTENDANCE RECORD

	<i>Total</i>	<i>Tourists</i>
12/ 6/72 thru 12/13/72		135
12/14/72 thru 12/20/72		261
3/ 3/73 thru 3/ 9/73	1010	307
3/10/73 thru 3/18/73	1417	192
(boat down for repairs)		
4/15/73 thru 4/21/73	1679	480
5/ 1/73 thru 5/ 6/73	1483	510
4/22/73 thru 4/30/73	1913	703
5/ 7/73 thru 5/13/73	1071	587
5/14/73 thru 5/20/73	840	518
5/28/73 thru 6/ 3/73	1614	1036
6/14/73 thru 6/10/73	1498	616
6/11/73 thru 6/17/73	1118	381

6/21/73 report: There has been considerable discussion of the Marina Queen operations by members of the promotion committee concerning the cost involved. These will be detailed for both meetings today. Kaiser Aetna still retains the ownership of the boat. The merchants have merely assumed the operational responsibility for the boat.

6/18/73 thru 6/24/73	1376	557
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6/28/73 report: Merchants Assn Board of Directors met Friday, June 22, 1973 and voted to assume responsibility for payment of the monthly operative cost for the Marina Queen through 1973.

6/25/73 thru 7/ 1/73	1209	479
7/ 2/73 thru 7/ 7/73	1026	325
7/ 9/73 thru 7/15/73	none as Marina Queen down for repairs	

*Plaintiff's Exhibit 52*

		<i>Total</i>	<i>Tourists</i>
7/18/73	7/22/73	1137	453
7/23/73	7/29/73	1510	643
no dates listed		1502	777
8/ 6/73	8/13/73	1872	819
8/13/73	8/19/73	1989	842
8/19/73	8/26/73	1489	610
8/27/73	9/ 2/73	1557	740
9/ 3/73	9/ 9/73	1086	575
9/10/73	9/16/73	913	516
9/17/73	9/23/73	884	543
9/24/73	9/30/73	994	631
10/ 1/73	10/ 7/73	669	442
10/ 8/73	10/14/73	744	623
10/15/73	10/21/73	866	485
10/22/73	10/28/73	1022	542
11/29/73	11/ 4/73	647	369
11/ 5/73	11/11/73	18	6
11/19/73	11/25/73	726	393
11/26/73	12/ 2/73		200
12/ 3/73	12/ 9/73	421	244
12/17/73	12/23/73	518	321
12/24/73	12/30/73	476	236
12/31/73	1/ 6/74	527	158
		<hr/> 38,821	<hr/> 18,254

1/14/74 Report: The operation of the Marina Queen has been suspended until further notice due to the fuel shortage and poor weather conditions. It is possible that the operation may be reinstated on a week end only basis later this year.

**Plaintiff's Exhibit 54**

(Letterhead of United States Coast Guard, Seventh Street  
SW, Washington, D.C. 20590)

27 Feb. 1973

From: Commandant

To: Commander, Fourteenth Coast Guard District(dl)

Subj. Navigable waters of the United States; Kuapa Pond,  
Oahu, Hawaii

Ref: (a) Ltr COMDT(GLMI) to CCGD14(dl), 5903/33-  
2, 24 Nov 1972

(b) Ltr CCGD14(dl) to COMDT(GLMI), 5903, 26  
Dec 1972 w/encl.

(c) Bridge Permit File 17-67

1. Reference (a) forwarded for comment a proposed Corps of Engineers determination that subject waters are navigable waters of the United States. Reference (b) indicated concurrence with the proposed determination and recommended that the Coast Guard similarly determine that these waters are navigable waters of the United States for the purposes of Coast Guard jurisdiction.

2. In accordance with that recommendation, for the reasons stated below, it is hereby determined that the waters of Kuapa Pond, Oahu, Hawaii are navigable waters of the United States and, accordingly, waters subject to the jurisdiction of the United States for the purposes of Coast Guard jurisdiction.

3. Kuapa Pond is fed by fresh water run off from surrounding hills and mountains and drains through two nar-

*Plaintiff's Exhibit 54*

row passages into Maunalua Bay and the Pacific Ocean. Prior to 1958 this waterbody served solely as a fish pond. On 30 March of that year, however, the owners of the land areas surrounding the pond and the submerged lands beneath it entered into a long term development agreement with private developers. In accordance with this agreement Kuapa Pond has been dredged, portions of the shore areas have been filled, and much of the adjacent land areas have been developed as residential and commercial properties. One immediate result of this development has been a large increase in the use of Kuapa Pond by recreational craft. As an indication of this use reference (b) notes that approximately 840 boat numbers have been issued to residents living in the area and that there is a privately maintained aid to navigation system in operation within the pond. While the use of the waters of the pond has been limited to residents, see reference (b), there is at least one dredged channel connecting these waters to Maunalua Bay and the Pacific Ocean. The plans accompanying the permit application for a bridge across this channel indicate that, prior to the bridge's construction and the channel's dredging, the channel at that time was 6.2 feet deep at the bridge site. Reference (c).

4. This extensive use by recreational craft coupled with the navigational improvements made in the pond (channel dredging and establishment of aid to navigation system) indicate its capability for use by the public for purposes of transportation and commerce; notwithstanding the denial of this use to the public by the developers. The dredged channel connecting the pond with the open sea provides the

*Plaintiff's Exhibit 54*

means by which this transportation and commerce might be conducted between the states and foreign countries.

5. Waters which are susceptible of being used in their ordinary condition as highways of interstate and foreign commerce are navigable waters of the United States. *The Daniel Ball*, 10 Wall. 557, 563 (1871). In *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940) the Supreme Court developed this principle and declared that:

To appraise the evidence of navigability on the natural condition only of the waterway is erroneous. Its availability for navigation must also be considered. . . . A waterway, otherwise suitable for navigation, is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken. *Id* at 407.

6. The weight to be given to evidence of private vessel usage of a waterway in determinations concerning navigable waters of the United States was discussed in the same decision. Earlier the Court in *United States v. Utah*, 283 U.S. 64 (1932), stated that:

The question of that susceptibility in the ordinary condition of the rivers, rather than of the mere manner or extent of actual use, is the crucial question. The government insists that the uses of the rivers have been more of a private nature than of a public, commercial sort. But, assuming this to be the fact, it cannot be regarded as controlling when the rivers are shown to be capable of commercial use. *Id* at 82.

Citing that passage the Court in *United States v. Appalachian Electric Power Co.*, *supra*, held:



*Plaintiff's Exhibit 54*

Nor is lack of commercial traffic a bar to a conclusion of navigability where personal or private use by boats demonstrates the availability of the stream for the simple types of commercial navigation. *Id* at 416.

7. A recent decision handed down by the District Court of the Western District of Washington held that a lagoon located immediately adjacent to the Strait of Juan de Fuca is not part of the navigable waters of the United States. *Pitship Duck Club v. Town of Sequim*, 315 F. Supp. 309 (1970). The facts in that case, however, were (as stated by the court) that:

At times during most days of the year, small boats can enter the lagoon from the strait and navigate to the Club's property. *Most of the time, however, small boats cannot enter the lagoon.* *Id* at 310. [Emphasis added].

8. While the use and disposal of the beds of navigable waters are determined in accordance with the laws of the state having jurisdiction, it is a well established principle that this use and disposal is subject to Congress' power to control the superjacent waters for the purposes of navigation in commerce among the states and with foreign nations. See *United States v. Holt Bank*, 240 U.S. 49, 54 (1925).

9. The waters of Kuapa Pond and the channel connecting it to the sea have been improved to the point where they constitute a highway for interstate and foreign commerce. *United States v. Appalachian Electric Power Co.*, *supra*. The extensive use of these waters by recreational craft

*Plaintiff's Exhibit 54*

(*C.F. Pitship Duck Club v. Town of Sequim*, *supra*) clearly demonstrates their susceptibility for commercial navigation, thereby according them the status of navigable waters of the United States. *United States v. Utah*, *supra*; *United States v. Appalachian Electric Power Co.*, *supra*. The fact that the bed of the pond is owned by private concerns does not alter this. *United States v. Holt Bank*, *supra*.

10. This determination represents the opinion of the Coast Guard as to the extent of its own jurisdiction. It should not be construed as an opinion concerning the jurisdiction of the United States, as such a determination can only be made through judicial or legislative proceedings.

/s/ C. R. BENDER  
C. R. Bender



**Plaintiff's Exhibit 59 Without Photographs**

IN THE  
UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

Civil No. 73-3864

UNITED STATES OF AMERICA,

*Plaintiff,*

vs.

KAISER-AETNA, *et al.*,

*Defendants.*

AFFIDAVIT OF WILLIAM H. KINZLEY

STATE OF HAWAII  
CITY AND COUNTY OF HONOLULU, ss.:

WILLIAM H. KINZLEY, being first duly sworn on oath, deposes and says:

That I am a First Lieutenant in the U.S. Army Corps of Engineers presently assigned to the 84th Engineer Battalion Construction, C Company, Schofield Barracks. My former assignment was with the Operations Branch, Construction-Operations Division, U.S. Army Engineer Division, Pacific Ocean, where part of my duties involved investigations of work in navigable waters to determine if there were violations of the Federal statutes which the Corps of Engineers enforces.

That on 25 April 1974 I conducted an investigation in the upper reaches of Kuapa Pond, Hawaii, to determine the effects of the tides on the pond. I placed a 48-inch metal

*Plaintiff's Exhibit 59 Without Photographs*

ruler in the water in the upper portion of Kuapa Pond in the vicinity of Huupii Place. This is in the left arm of Kuapa Pond as you go mauka of the Wailua Street bridge.

That the results of that investigation are tabulated below relating the times and depths represented by the photographs indicated below and attached hereto. The exhibit numbers appear on the reverse of the photographs.

<i>Photographic Exhibit No.</i>	<i>Time of Photograph</i>	<i>Depth of Water on a 48" Ruler</i>
32 (24-25)	1100 hours	15"
34 (26)	1200 hours	16 $\frac{3}{4}$ "
35 (27)	1600 hours	37 $\frac{1}{2}$ "
36 (28)	1700 hours	42 $\frac{1}{2}$ "
37 (29)	1745 hours	45"

One other measurement was taken at 1800 hours in the same location with a depth reading on the ruler of 44 $\frac{3}{4}$ ". The measurements above reflect a 30-inch difference in the water level between 1100 hours and 1745 hours.

Further Affiant sayeth not.

WILLIAM H. KINZLEY

Attachments

Exs. 32, 34, 35, 36 & 37

Subscribed and sworn to before  
me this — day of February, 1975.

MASAO TANIMOTO

Notary Public, 1st Judicial Circuit  
State of Hawaii

City and County of Honolulu

My Commission Expires on May 28, 1977

**Plaintiff's Exhibit 60**

IN THE  
UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

Civil No. 73-3864

---

UNITED STATES OF AMERICA,

*Plaintiff,*

vs.

KAISER-AETNA, *et al.*,

*Defendants.*

---

AFFIDAVIT OF VERNON B. KALINO

State of Hawaii

City and County of Honolulu, ss.:

VERNON B. KALINO, being first duly sworn on oath, deposes and says:

That I have lived in Hawaii my entire life and have on many occasions visited Kuapa Pond. My first visit to that area would have been about 1948. I am familiar with the operation of the fish pond and the fish gates which were at the entrance to Kuapa Pond on the mauka side of the Kokohead bridge. These gates consisted of rock walls spaced about six to eight feet apart. The wall extended above the water surface about two to three feet. Between the walls were gates made of wood frames with chicken wire type interiors. The gates were constructed so they could be raised and lowered. The operators would raise

*Plaintiff's Exhibit 60*

the gates when the tide came in and then lower them to trap the fish that had entered the pond. I was aware that the tides affected Kuapa Pond in those days because I could see the current moving into the pond when the tides rose and moving back out as the tide lowered.

Further Affiant sayeth not.

VERNON B. KALINO

Subscribed and sworn to before  
me this — day of February, 1975.

MASAO TANIMOTO

Notary Public 1st Judicial Circuit

State of Hawaii

City and County of Honolulu

My Commission Expires on May 28, 1977

**Defendants' Exhibit 14**

(Letterhead of Department of the Army, Honolulu District,  
Corps of Engineers, Bldg 96, Ft. Armstrong, Honolulu,  
Hawaii 96813)

In Reply Refer to  
POHVK 799-D

5 April 1966

Mr. D. M. Snow  
Project Engineer  
Kaiser Hawaii-Kai  
P. O. Box 2997  
Honolulu, Hawaii 96802

Dear Sir:

Reference is made to your letter dated 28 March 1966 and attached drawing showing the proposed Hawaii-Kai Marina Bridge and Channel.

The following are comments on your proposed work:

a. The proposed new structure will not interfere with any Federal navigation project, and enlargement of the channel will improve circulation in the Kuapa Pond.

b. From observations, the tidal prism in Kuapa Pond produces relatively high velocities through the existing channel. Whether or not velocities through the proposed channel will be hazardous to small boat navigation is not known.

c. The clearance through the proposed structure is an improvement over present conditions.

*Defendants' Exhibit 14*

d. The deepening of the channel may cause erosion of the beach in the Portlock area. A jetty on the Koko Head side of the channel may be found necessary to retain the beach and reduce shoaling in the channel.

Sincerely yours,

/s/ EVERETTE A. FLANDERS  
Everette A. Flanders  
Chief, Construction Division

**Defendants' Exhibit 15**

(Letterhead of Kaiser Hawaii-Kai Development Co.,  
7120 Kalaniana'ole Highway, P.O. Box 2907,  
Honolulu, Hawaii 96802)

April 26, 1966

Department of the Army  
Honolulu District, Corps of Engineers  
Building 96, Fort Armstrong  
Honolulu, Hawaii 96813

Subject: *Hawaii-Kai Marina Bridge*

By your letter of April 5, 1966, you indicated general concurrence with our proposal for the Marina Bridge.

It is our understanding that no separate federal permit will be required for this construction, and that there will be no requirement for public use or control of any waters on the Kuapa Pond side of the bridge.

Very truly yours,

D. M. Snow  
Project Engineer

DS:hk

/s/ EVERETTE A. FLANDERS  
Everette A. Flanders  
Chief, Construction Division

**Defendants' Exhibit 36 Without Maps**

IN THE  
UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

Civil No. 73-3364

---

UNITED STATES OF AMERICA,

*Plaintiff,*

vs.

KAISER-AETNA, *et al.*,

*Defendants.*

---

AFFIDAVIT OF BARRY OKUDA

STATE OF HAWAII,  
CITY AND COUNTY OF HONOLULU, ss.:

BARRY OKUDA, being first duly sworn on oath, deposes and says:

That I am a civil engineer and have been employed by Kaiser-Aetna and its predecessors in interest since June, 1965. One of my responsibilities was to coordinate with government agencies concerning certain construction plans and required permits in the development of the Hawaii-Kai Marina.

Sometime during the latter part of 1966 or early 1967, Kaiser-Aetna was preparing plans for the construction of the Hawaii-Kai Marina Bridge and also channel excavation which would permit access to Maunalua Bay and the ocean for boaters permitted to use the Hawaii-Kai Marina. At



*Defendants' Exhibit 36 Without Maps*

that time, I confirmed with the Corps of Engineers and the U.S. Coast Guard that their prior approval for this project was necessary. This was a requirement because the channel excavation was to be performed in Maunalua Bay, and the bridge was to be built within land owned by the State of Hawaii abutting Maunalua Bay. (See Attachment "A").

Prior to that time, I had discussions with the Corps of Engineers concerning not only the Hawaii-Kai Marina Bridge but the Hawaii-Kai Drive Bridge. I was told that neither the Hawaii-Kai Drive Bridge nor the dredging of the Marina (Kuapa Pond), which was going on about that time, required Corps of Engineers or Coast Guard approvals since the Marina waters were private. Accordingly, this work, as well as other bridges (see Attachment "B"), walls, docks and dredging within the Marina were done without Corps permits and without any objection from the Corps and Coast Guard until 1972 when Kaiser-Aetna was notified that the waters of the Marina (Kuapa Pond) were considered navigable waters of the United States.

Further Affiant sayeth naught.

/s/ BARRY OKUDA  
Barry Okuda

Subscribed and sworn to before  
me this 6th day of February, 1975.

LORENE K. L. YOSHIYAMA  
Notary Public, First Judicial Circuit  
My commission expires: August 29, 1978

[Attachments "A" and "B" omitted]

**Defendants' Exhibit 37**

IN THE  
UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

Civil No. 73-3864

---

UNITED STATES OF AMERICA,

*Plaintiff,*

vs.

KAISER-AETNA, *et al.*,

*Defendants.*

---

AFFIDAVIT OF LAMBRETH HANCOCK

STATE OF HAWAII,  
CITY AND COUNTY OF HONOLULU, ss.:

LAMBRETH HANCOCK, being first duly sworn on oath deposes and says:

That I was employed by Kaiser Hawaii-Kai Development Co. before the beginning of the development stage and was familiar with Kuapa Pond and its surrounding area prior to dredging and construction activity. During the early years with Kaiser Hawaii-Kai Development Co., I was an administrative assistant to Henry J. Kaiser. Subsequently, I was vice-president of the company until my retirement in July 1975.

Prior to its development, Kuapa Pond was used to raise mullet and other fish by persons who leased the Pond from the Trustees of the Bishop Estate. The water was shallow and often had a very foul odor—particularly at low tide.

*Defendants' Exhibit 37*

Surrounding the Pond were several pig farms and many areas had developed into unofficial dumping grounds for refuse, junked cars, refrigerators, etc. There was also some grazing of livestock and poultry raising. The few homes that surrounded the Pond had cesspools as no city sewer system was available. During heavy rains, refuse and waste from the pig farms, refuse areas, etc. washed into the Pond.

Since the development of Kuapa Pond into the Hawaii-Kai Marina, pig farms, livestock and poultry raising have been relocated out of the watershed and sewage is piped away to a sanitary treatment plant built by the development company. Dumps and rubbish areas no longer exist around the Pond.

At the present time, the primary use of the Hawaii-Kai Marina is recreational. Sailing, boating and water-skiing are the most popular activities followed by crabbing, fishing and swimming.

My house is located near the Marina bridge and I have had much opportunity to observe the action of the Pond before and after the dredging operations. While I noticed odors before the Pond was developed, I have noted no unpleasant odor since the development of the Marina complex either at high or low tide.

I have noticed also the absence of limu growth and water lettuce since the development of the Marina. Such growth is usually a sign of water stagnation. I have, however, noted an opihi-like shellfish establishing their colonies on the shoreline of several areas within the Marina. These shellfish thrive in fresh ocean water and were not found in Kuapa Pond prior to its development.

*Defendants' Exhibit 37*

The twelve mile shoreline within the Marina is stabilized by a gravity boulder wall consisting of large boulders placed one on top of another up to the low water line, and small "man-size" boulders placed from the low water line to about 3' above sea level. The front face is mortared to resist surface wave wash. The walls were constructed at great expense to Kaiser Hawaii-Kai Development Co. and Kaiser Aetna.

Rules and regulations governing the use of the Marina have been established to maintain the quiet and privacy of the Marina area and its surrounding residences, and to permit a controlled recreational use of the waterways. A Marina Patrol is maintained seven days a week plus occasional night patrols. On weekends and holidays there are at least two patrol boats on duty and sometimes three. The patrol boats not only insure the privacy of the waters and enforce safety regulations, but also perform such jobs as removing floating debris which often follows storms.

Further Affiant sayeth naught.

/s/ LAMBRETH HANCOCK  
Lambreth Hancock

Subscribed and sworn to before  
me this 7th day of February, 1975.

LORENE K. L. YOSHIYAMA  
Notary Public, First Judicial Circuit  
My commission expires: August 29, 1978

**Court Exhibit 1**

IN THE  
UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

Civil No. 73-3864

---

UNITED STATES OF AMERICA,

*Plaintiff,*

vs.

KAISER AETNA, *et al.*,

*Defendants.*

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**POST TRIAL STIPULATION OF FACTS**

In addition to Hawaii-Kai Marina lot lessees, approximately eighty-six (86) other Hawaii-Kai residents are licensed to use the marina facilities and pay fees for the full use of the marina waters (Kuapa Pond). Only marina lot lessees or Hawaii-Kai residents are permitted full privileges of using the waters of the marina.

However, fifty-six (56) non-residents of Hawaii-Kai have been extended the limited privilege of renting slips at the marina boat docks. For this privilege, non-residents pay the full monthly marina fees plus slip rental fees. These non-residents are not permitted the use of the waters of the marina other than the right of ingress and egress from the dock slip facility to Maunalua Bay.

*Court Exhibit 1*

So STIPULATED this       day of December, 1975, at Honolulu, Hawaii.

Respectfully submitted,

HAROLD M. FONG

*United States Attorney  
District of Hawaii*

By \_\_\_\_\_

STEPHEN D. QUINN  
Assistant U. S. Attorney  
*Attorneys for Plaintiff  
United States of America*

/s/ R. CHARLES BOCKEN  
R. CHARLES BOCKEN  
*Attorney for Defendants  
Kaiser-Aetna and Hawaii-  
Kai Development Co.*

/s/ G. RICHARD MORRY  
G. RICHARD MORRY  
*Attorney for Defendant  
Trustees of the Bernice  
P. Bishop Estate*

**Court Exhibit 2**

(Letterhead of Kaiser Hawaii-Kai Development Co.,  
7120 Kalaniana'ole Highway, P.O. Box 2907,  
Honolulu, Hawaii 96802)

March 28, 1966

District Engineers  
United States Army Engineers  
District—Honolulu  
Fort Armstrong  
Honolulu, Hawaii

Attention: Operations (Bldg. 96)

Gentlemen:

Subject: Proposed Hawaii-Kai Marina  
Bridge & Channel

We are forwarding for your comment, a copy of a drawing showing the proposed Hawaii-Kai Marina Bridge and Channel, as recommended by the State Division of Highways. The marina access is to be obtained by raising a section of Kalaniana'ole Highway in the vicinity of Kuapa Bridge and replacing the existing bridge with a 225-foot long bridge with a bottom elevation over a portion of the span of 13.5 MSL, as a means of obtaining adequate clearance for boats entering the marina.

In addition, the channel, of approximately 200 feet in width, will be dredged to about -9 MSL to permit boat traffic as well as to provide a greatly improved drainage outlet for Kuapa Pond.

*Court Exhibit 2*

We would appreciate your comments on this proposed plan at your earliest convenience. We realize, of course, that your views will be preliminary in nature and that final approval will depend on detailed design of the bridge and channel.

Very truly yours,

/s/ D. M. SNOW  
D. M. SNOW  
Project Engineer